SUPREME COURT, U. S.

NOV [illegible] 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 774.

LUCRETIA PETEROS RICHARDSON,
Appellant,
v.
DR. JONATHAN O. COLE, SUPERINTENDENT, BOSTON STATE HOSPITAL,
AND
DR. MILTON GREENBLATT, COMMISSIONER, DEPARTMENT OF MENTAL HEALTH, COMMONWEALTH OF MASSACHUSETTS,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

MOTION TO AFFIRM.

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The appellees, Dr. Jonathan O. Cole and Dr. Milton Greenblatt, pursuant to Rule 16 of the Rules of this Court, hereby move to affirm so much of the decision of the court below as was appealed in case No. 774. (Appellees in this cross-appeal are appellants in case No. 679.) This motion is made on the ground that the questions on which the decision of the cause depends are so insubstantial as to require no further argument, and on the further ground that the decision below is fully supported by case law.

As appellant concedes in her jurisdictional statement, at page 6, the question of the appellant's damages is a question of substantive state law. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). In Massachusetts, the extent of a plaintiff's injury and the sum required to fairly compensate him are questions of fact, resting in the discretion of the trial court. *Kinnear* v. *General Mills, Inc.*, 308 Mass. 344, 349, 32 N.E. 2d 263 (1941). Only in rare instances is the award to be disturbed. An appellate tribunal must allow a decision on the issue of damages to stand unless the court's refusal, or alternatively the court's grant of damages, was an abuse of discretion amounting to an error of law. An abuse of discretion consists of judicial action that no conscientious judge, acting intelligently, could honestly have taken. Only when an imperative legal duty supersedes the discretion of the court will an award or refusal of damages be overturned. *Bartley* v. *Phillips*, 317 Mass. 35, at 43, 44, 57 N.E. 2d 26 (1944), and cases cited therein, followed, *e.g.*, in *Growers Outlet, Inc.* v. *Henry E. Stone*, 333 Mass. 437, 131 N.E. 2d 210 (1956), and *Babish* v. *Cambridge*, 337 Mass. 274, 149 N.E. 2d 229 (1958). See also *King Features Syndicate, Inc.* v. *Cape Cod Broadcasting Co. Inc.*, 318 Mass. 783, 64 N.E. 2d 925 (1945).

It is respectfully submitted that, in the case at bar, examination of the evidence before the three-judge court on the issues of damages does not disclose that the court abused its discretion.[1]

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[1] If the court determines that the standard of reviewability of the three-judge court's award of damages is not a matter of substantive state law, and that some other standard applies, such as that enunciated by the Second Circuit Court of Appeals in *Dagnello* v. *Long Island Rail Road Co.*, 289 F. 2d 797 (1961), and that such standard is different from that employed by Massachusetts courts, it is respectfully submitted that examination of the evidence before the three-judge court on the issue of damages would not disclose that the court's decision was wrong.

As discussed above, a factual analysis is sufficient to disclose no basis for an award of back pay. An independent ground for an affirmance of this aspect of the decision below is premised on the issue of retroactivity.

It is submitted that, for good reason, the three-judge court limited its injunction to future refusals of employment based on a failure to subscribe to the loyalty oath. The court manifested no intent that past denials of public employment now give rise to judicial relief.

Conclusion.

For the reasons stated above, appellees respectfully move that this Court affirm the decision of the court below on the precise issue raised in this cross-appeal.

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